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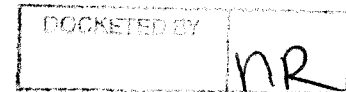
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Arizona Corporation Commission

DOCKETED

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and Arizonans for Electric Choice and Competition

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE
COMMISSION'S INQUIRY INTO RETAIL
ELECTRIC COMPETITION

DOCKET NO. E-00000W-13-0135

**FREEPORT-MCMORAN COPPER &
GOLD INC. AND ARIZONANS FOR
ELECTRIC CHOICE AND
COMPETITION NOTICE OF FILING
REPLY COMMENTS TO RESPONSES
TO STAFF'S MAY 23, 2013 LETTER
CONCERNING RETAIL ELECTRIC
COMPETITION**

Freeport-McMoRan Copper & Gold, Inc. and Arizonans for Electric Choice and
Competition (collectively, "AECC") hereby submits its Reply Comments to Responses to
Staff's May 23, 2013 Letter Concerning Retail Electric Competition.

RESPECTFULLY SUBMITTED this 16th day of August, 2013.

FENNEMORE CRAIG, P.C.

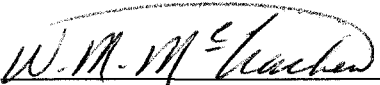
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17 Competition (collectively, "AECC") hereby submit these Reply Comments to Responses
18 to Staff's May 23, 2013 letter concerning Retail Electric Competition.

19 **INTRODUCTION**

20 In their opposition against the re-establishment of retail electric competition in
21 Arizona, various entities, including Affected Utilities¹ and Salt River Project ("SRP"),
22 raise issues that have already been thoroughly addressed by the Arizona Corporation
23 Commission ("Commission") and **interested stakeholders** in numerous technical
24 workshops and evidentiary hearings. Such issues include, but are not limited to:

25
26 ¹ Affected Utilities include all investor-owned utilities and electric cooperatives in Arizona. See R14-2-1601(1).

1 (1) Stranded cost recovery;² (2) Unbundled services; (3) Standard Offer Service; (4) Provider of
2 Last Resort service; (5) Competitive meter and meter reading; (6) Independent scheduling
3 administrator; (7) Exit and return fees; (8) Self-build options; (9) Code and Conduct
4 requirements; and (10) Divestiture.

5 In addition, since the adoption of the Electric Competition Rules ("Rules"), the
6 Commission has addressed in workshops or in Commission hearings the following energy
7 and environmental issues: (1) Renewable Energy Standard Tariff and Rules; (2) Integrated
8 Resource Planning Rules; (3) Energy Efficiency; (4) Demand-Side-Management; (5)
9 System Benefit Charges; (6) Distributed Energy; (7) Process Standardization; (8) Net
10 Metering; (9) Environmental risks. The resolution of these issues has not created any
11 impediment to the reinstatement of retail electric competition in Arizona.

12 SRP estimates that addressing these issues once again would take several years.³
13 Arizona Public Service Company ("APS") and several electric cooperatives estimate that
14 start up costs could run into the "hundreds of millions of dollars."⁴ However, these
15 "conclusive" statements rest more on conjecture without any basis in fact. Nevertheless,
16 Affected Utilities, SRP and their lobbyists have waged a relentless, extensive and
17 expensive campaign (including the use of social media) to convince various civic,
18 charitable and community organizations, in addition to several business groups and
19 political leaders, that retail electric competition is bad for the State and Arizona
20 consumers.⁵

21 Ironically SRP, who is one of the biggest opponents of competitive retail electric

22 ² Hearings were held for the recovery of stranded costs by Affected Utilities and SRP. In addition, Affected Utilities
23 and SRP have already recovered millions of dollars in transition costs as a result of the Commission's first
implementation of retail electric competition.

24 ³ SRP Initial Comments at 41.

25 ⁴ APS Initial Comments at 13.

26 ⁵ It is unclear why groups devoted to the development of business oppose the development of a competitive market
in the generation of electricity. (The distribution and transmission of electricity is not subject to restructuring).

1 markets, is presently subject to retail competition pursuant to the Electric Competition
2 Act of 1998 ("EAct"). See A.R.S. §§ 40-202, 207, 208. The EAct was passed as
3 companion legislation to the Commission's Rules, which SRP argues is outdated
4 legislation that failed the passage of time.⁶ Obviously, such is not the case since the
5 EAct has not been repealed. In fact, if the Commission were to issue a certificate of
6 convenience and necessity ("CC&N") to an electric service provider ("ESP"), which the
7 Commission can do under existing authority, such ESP would have the right to compete
8 with SRP in the provision of generation service.

9 Moreover, the Rules were left largely intact after several legal challenges and the
10 Arizona Court of Appeals' landmark decision in *Phelps Dodge v. Arizona Elec. Power*
11 *Coop.*, 207 Ariz. 95, 83 P. 3d 573 (App. 2004) ("*Phelps Dodge*"). As discussed in more
12 detail later herein, the *Phelps Dodge* case does not restrict the Commission from
13 reinstating competitive retail electric markets. Frankly, Arizona law as currently written
14 is structured to support competition, and much more effort would be needed to reverse
15 the course than to complete the process by amending the Rules to address the issues
16 raised by the *Phelps Dodge* decision, as discussed herein, so that – together with the
17 EAct – Arizona can move towards a competitive retail electric market.

18 Much attention has also been directed by APS and SRP to the alleged effect retail
19 electric competition might have on coal-fired generation. There would be little change
20 in a competitive environment provided for by the reinstatement of retail electric
21 competition based on the historical pricing for coal. If anything, the costs of
22 environmental retrofitting and emission control mandates by the U.S. Environmental
23 Protection Agency ("EPA") will push these coal units to become less economic, though
24 by APS' own admission, coal represents a lower-cost alternative to other traditional fuel

25
26 ⁶ SRP Initial Comments at 44.

1 sources like natural gas – even when you add on environmental compliance costs.⁷ As
2 addressed in more detail herein, AECC will demonstrate why arguments involving EPA
3 imposed requirements for coal-fired generation are irrelevant to the issue of retail
4 electric competition.

5 The question must be asked; why are Affected Utilities and SRP so resistant to
6 retail competition?⁸ According to SRP and other parties, Arizonans currently (i) have a
7 much better deal than most parts of the country, (ii) enjoy award-winning customer
8 service, (iii) have low prices, (iv) can select from a wide array of price options and
9 services, (vi) benefit from an excellent mix of generation, integrated planning and
10 preparedness, and (viii) receive stable and reliable service.⁹ These claims certainly set
11 high standards for any competitor to meet. Rather than test their rates against those who
12 wish to compete, Affected Utilities would rather keep the status quo of a captive
13 customer group, pass-through surcharges and traditional rate of return regulation.
14 Likewise, SRP (which is unregulated as to rates, charges or service) enjoys the benefit of
15 a captive customer base, which only the Commission can take away at this time through
16 the issuance of competitive CC&Ns to ESPs.

17 Through an extensive public campaign, Affected Utilities and SRP have
18 orchestrated, to bring pressure to bear on members of the Commission to not even
19 consider the matter on its merits, beyond stakeholders' written comments, or any
20 competing claims.

21
22 ⁷ Docket No. E-01345A-10-0474; APS Application at 25.

23 ⁸ In testimony on HB 2663 [Electric Power Competition] before the House Committee on Government Operations,
24 then SRP Chairman Richard Silverman stated the following: "...I want to compliment the Committee first on your
25 efforts to bring competition to the State along with the other speakers. It is a critical issue but it is incredibly
26 important that we ensure that our customers receive the benefits of competition. Some two years ago, the publicly
elected Board of Directors of SRP adopted a plan for competition, the first point we embrace it, it is what our
customers want and the best thing we can do for them..." February 20, 1998.

⁹ SRP Initial Comments at 6.

1 AECC urges the Commission to take the time necessary to address the question
2 of whether retail electric competition is in the public interest and will benefit Arizona
3 consumers.

4 DISCUSSION

5 I. The Phelps Dodge Decision.

6 A. Legal Principles

7 The *Phelps Dodge* decision stands for the following legal principles:

- 8 1. Even though Rule R14-2-1611(A), which allowed the market alone to
9 determine rates, was declared unconstitutional, **the remaining rules can**
10 **be applied in a manner consistent with the Constitution.**
 - 11 a. Even though R14-2-1611(A) is invalid under the Constitution, **the**
12 **remaining rules are workable and can therefore continue to**
13 **exist.**
 - 14 b. **The Rules are independent of R14-2-1611(A) and are**
15 **enforceable standing alone.**
 - 16 c. **The invalid portion of the Rules can be severed with the**
17 **remaining Rules intact and enforceable.**
- 18 2. The fair value provision in the Constitution is **self-executing** as it
19 affirmatively requires the Commission to determine fair value in setting
20 rates, **and a rule is therefore not required to impose this requirement.**
- 21 3. No rule specifically requires the Commission to determine and consider
22 the fair value and that omission does not invalidate the Rules.
- 23 4. The Rules empower the Commission to gather sufficient information to
24 make the fair value determination.
- 25 5. **Nothing in the Constitution requires the Commission to prescribe a**
26 **single rate rather than a range of rates.**
6. Assuming the Commission establishes a range of rates that is just and
reasonable, **the Commission does not violate the Constitution by**
permitting competitive market forces to set specific rates within that
approved range.

1 7. The APA does not require the Commission to conduct any evidentiary
2 hearings before promulgating the Rules.

3 B. Constitutionality

4 The provisions of the *Phelps Dodge* decision, and arguments used by opponents to
5 conclude that retail electric competition is contrary to Arizona law, can be summarized as
6 follows:

- 7 1. The setting of rates requires a determination of fair value;
8 2. The Commission cannot set a broad range of rates within which the
9 competitive market place can operate;
10 3. Mandatory divestiture is unconstitutional;
11 4. The Commission has no authority to require affected utilities to
12 participate in the AzISA; and
13 5. Certain portions of the Rules required certification by the Attorney
14 General.

15 C. Analysis of Fair Value Finding Requirement

16 Grand Canyon State Electric Cooperative Association (“Co-ops”) and Arizona
17 Investment Council (“AIC”) argue that the Commission is required to find fair value and
18 use fair value in setting rates.¹⁰ Implicit in their argument is a requirement that the
19 Commission must set the rate on the basis of the fair value finding. This argument
20 ignores specific language in the *Phelps Dodge* decision, which states:

21 “...the Commission should consider fair value when setting
22 rates within a competitive market, although the Commission
23 has **broad discretion in determining the weight to be given**
24 that factor in any particular case...”¹¹ [Emphasis added]

25 ¹⁰ See Initial Comments – Exhibit A at 2.

26 ¹¹ *Phelps Dodge* at 207 Ariz. 95, 105, 83 P. 3d 573, 585.

1 Moreover, "the fair value provision in the Constitution is self-executing" and "a Rule is
2 not required to impose the requirement." In fact, the court found that "The Rules
3 empower the Commission to gather sufficient information to make the fair value
4 determination."¹²

5 By focusing on the constitutional requirement for the Commission to make a fair
6 value determination, the Co-ops and AIC erroneously conclude that "fair value
7 ratemaking is inherently antithetical to the concept of rates established by a competitive
8 market." This position ignores the power of the Commission to consider fair value at
9 the time it considers an ESP's application for a CC&N, yet use its broad discretion in
10 determining what weight fair value should be given "when setting rates within a
11 competitive market."

12 D. Range of Rates

13 In order to support their conclusion, the Co-ops and AIC are forced to argue that
14 the Commission cannot set a "broad" range of rates within which the competitive market
15 place can operate.¹³ Although the *Phelps Dodge* case did not define the word "broad",
16 the Co-ops and AIC have defined the word to mean "open-ended."¹⁴ There is no
17 discussion in the *Phelps Dodge* decision of an open-ended rate. The decision does,
18 however, state that the Commission may establish a **range of rates** in setting just and
19 reasonable rates.¹⁵

20 In the *Phelps Dodge* case, the Co-ops and AIC argued that Article 15, Section 3
21 of the Arizona Constitution required the Commission to prescribe a single rate rather
22 than a range of rates. The Court rejected this argument, stating that:

23 _____
24 ¹² *Phelps Dodge* at 207 Ariz. 95, 110, 83 P. 3d 573, 588.

25 ¹³ Initial Comments, Exhibit A at 3.

26 ¹⁴ *Id.*

¹⁵ In fact A.R.S. § 40-368 provides for a "sliding scale of charges."

1
2 “Nothing in the plain language of Article 15, Section 3 requires the
3 Commission to prescribe a single rate rather than a range of rates.”

4 The Court then stated that:

5
6 “Consequently, assuming the Commission establishes a range of
7 rates that is “just and reasonable”, the Commission does not violate
8 Article 15, Section 3 by permitting competitive market forces to set
9 rates within that approved range.”¹⁶

10 The authority to prescribe a range of rates is consistent with the analysis provided by the
11 Arizona Center for Law in the Public Interest (“ACLPI”). In reviewing the *Phelps*
12 *Dodge* decision on the narrow issues of fair value and just and reasonable rates, ACLPI
13 determined that:

14 “The Court held that assuming the Commission establishes a range
15 of rates that is “just and reasonable,” the Commission does not
16 violate Article 15, § 3 by permitting competitive market forces to set
17 specific rates within that approved range.”¹⁷

18 E. Monopoly Service and the Electric Competition Act of 1998

19 SRP contends that the Arizona Constitution mandates a system of regulation, and
20 that this is inapposite to “de-regulation.” Furthermore, SRP argues that the Electric
21 Competition Act of 1998 (“EAct”) is outdated and no longer applicable. SRP is
22 incorrect on both counts.

23 First, SRP’s notion that a competitive market is antithetical to Arizona’s
24 mandated system of regulation (just and reasonable rates) implies a regulatory scheme
25 centered around monopolies, and completely ignores the fact that competitive forces in

26
¹⁶ *Phelps Dodge* at 207 Ariz. 95, 109, 83 P. 3d 573, 587

¹⁷ See ACLPI Initial Comments at 4, ln. 1-4.

1 the telecommunications industry are already being used in Arizona to ensure just and
2 reasonable rates. In *The Mountain States Telephone and Telegraph Company v. Arizona*
3 *Corporation Commission*, 132 Ariz. 109, 113, 644 P.2d 263, 276, the court stated that:

4 The constitutional provision which granted this authority [to prescribe
5 just and reasonable rates] and hence jurisdiction is silent as to any
6 concepts of "regulated monopoly." The concept of the regulated
7 monopoly arose from the legislature in granting the Commission the
8 authority to issue certificates of convenience and necessity to public
9 service corporations."

9 The Arizona Constitution does not mandate a system of regulated monopolies, but rather
10 leaves to the Commission and Legislature the discretion to structure a regulatory system,
11 as long as a finding of fair value is required when setting rates.¹⁸ In fact, the ECAct is
12 predicated on a system of open competition in generation (A.R.S. §40-202), and
13 permitting electric generation service prices to be established "in a competitive market"
14 requires the Commission to first adopt rules on retail electric competition,¹⁹ and then
15 issue individual CC&Ns to ESPs (after a finding of fair value) with the discretion to
16 impose conditions such as a range of rates.²⁰ Finally, if the ECAct were outdated and
17 no longer applicable as SRP suggests, then it would have been repealed years ago.

18 F. Rate Discrimination, Price Transparency and a Bi-furcated Market

19 APS suggests that even if all the problems with *Phelps Dodge* are resolved, there
20 exist a few more impediments unaddressed by the opinion; namely, rate and service
21 discrimination (Arizona Constitution -Article 15, Section 12; A.R.S. § 40-374)²¹, price
22 transparency (A.R.S. §40-367) and the potential for a bi-furcated system of regulation

23 ¹⁸ SRP is not subject to the same fair value finding requirement, as its Board of Directors sets SRP's rates.

24 ¹⁹ A.R.S. §.40-207.

25 ²⁰ The Rules were found sufficient to make a fair value determination. *Phelps Dodge* at 207 Ariz. 95, 110, 83 P. 3d
573, 588.

26 ²¹ The Co-ops makes the same argument concerning rate discrimination.

1 between APS and SRP. These arguments are without merit for the following reasons:

- 2 • Article 15, Section 12 of the Arizona Constitution prohibits
3 discrimination in charges and rates for “like and contemporaneous
4 service.” Offering different rates for different services and products
5 within a range of rates does not violate this principle; otherwise, time-
6 of-use rates and other rate classifications would be subject to the same
7 prohibitions.
- 8 • A.R.S. § 40-374 prohibits the use of rebates and agreements, “except
9 such as are regularly and uniformly extended to all persons and except
10 upon order of the Commission.” Any concerns about violations of this
11 statute can be addressed in the normal course of regulatory oversight
12 the Commission has over public service corporations and ESPs.
- 13 • A.R.S § 40-367 prohibits a public service corporation from changing
14 rates without notice. By establishing a permissible range of rates in a
15 CC&N order, any change to such tariffed rate on file with the
16 Commission would require Commission approval, as is currently the
17 case with telecommunication companies seeking to raise or lower price
18 caps for competitive services.

14 APS also raises the issue of a bifurcated competitive market in which APS and
15 SRP must each provide electric service according to different rules and policies. This
16 perspective views a Commission decision to adopt retail electric competition as taking
17 the industry only halfway towards competition. In reality, such a Commission decision
18 will take Arizona all the way towards competitive markets in generation, since the
19 ECAct already allows for competition in SRP’s service territory. AECC does not
20 consider the 1955 Territorial Agreement between APS and SRP to be an impediment to
21 the introduction of retail electric competition, nor should the Commission.

22 G. The Rules

23 The electric competition Rules which the *Phelps Dodge* decision held to be
24 invalid by the Court did not eliminate the remaining regulatory framework which
25 governs Retail Electric Competition.

1 1. As previously discussed, the Court held that Rule R14-2-1611(A)
2 ("market determined rates") was unconstitutional because the Commission had not
3 taken into consideration fair value in approving rates.

4 The Court, however, specifically found that R14-2-1611(A) could be
5 severed from the remainder of the Rules and that "the remaining Rules,
6 however, can be applied in a manner consistent with the Constitution."
7 Furthermore, the Court stated: "... we have no difficulty concluding that
8 the Rules are independent of R14-2-1611(A) and are enforceable standing
9 alone."

10 2. The Court also held that R14-2-1615(A) and (C) (involving Separation of
11 Monopoly and Competitive Services - "divestiture") "are aimed at controlling the
12 Affected Utilities rather than rates and are therefore outside the Commissions plenary
13 rulemaking authority."

14 However, this issue became moot because both APS and TEP applied to
15 the Commission for a waiver of the requirements of the Rule, which the
16 Commission granted, and the Rule was therefore never applied. In
17 addition, the Court concluded that "... the Commission can permissibly
18 require an Affected Utility that chooses to transfer competitive assets to
19 an affiliate to do so at a fair and reasonable price, as determined by the
20 Commission."

21 The reinstatement of retail electric competition does not require
22 divestiture of generation assets by Affected Utilities. Divestiture is not a
23 necessary component of allowing direct access to proceed.
24
25
26

1 3. The Court held that the provisions of R14-2-1609(C)-(J) which direct
2 Affected Utilities to create an independent scheduling administrator and a scheduling
3 coordinator (AzISA) to oversee fair access to transmission services were not reasonably
4 necessary steps to ratemaking and consequently the Commission was without
5 constitutional or legislative authority to promulgate these provisions of the Rules.
6 However, R14-2-1609(A) which states that Affected Utilities must provide non-
7 discriminatory open access to transmission and distribution facilities, was not
8 challenged.²² In a subsequent Commission proceeding following the *Phelps Dodge*
9 decision involving the AzISA, the Commission stated:

10 “We find that Phelps Dodge had no impact on the continuing
11 economic viability of the AISA, and that it does not reduce the
12 continued public benefit associated with maintaining Commission
13 support of the AISA at its current level of operations. The AISA
14 currently provides the important public benefit of keeping the
15 possibility of retail access available in Arizona to consumers at a
16 minimal cost by providing potential competitors with the
 necessary assurance that they will have fair and equitable access
 to transmission until an RTO is formed and approved by FERC
 to take over that function.”²³

17 Protocols established by the AzISA on file with the FERC can facilitate direct
18 access in the absence of R14-2-1609(C)-(J). Moreover, APS’s flippant comment that the
19 AzISA was “unlawfully created in the first instance” is simply wrong and belies APS’s own
20 role in helping to create the organization. Efforts by Arizona stakeholders, including APS, to
21 lawfully form the AzISA predated the adoption of the mandate in the Commission’s Rules.
22 Moreover, APS further bound itself to development of this organization independently of R14-
23 2-1609(C)-(J) by agreeing in its Settlement Agreement in Docket No. E-01345A-98-0473 *et al*

24 ²² In fact, A.R.S. 40-332(B) specifically provides that: “Every public service corporation shall allow every electricity
25 supplier and self-generator of electricity access to electric transmission service and electric distribution service under
26 rates and terms and conditions of service that are just and reasonable as determined and approved by regulatory
 agencies that have jurisdiction over electric transmission service and electric distribution service...”

²³ Decision No. 68485 at 15.

1 to "actively support the Arizona Independent Scheduling Administrator" and "to modify its
2 OATT to be consistent with any FERC approved AISA protocols."²⁴ As demonstrated in this
3 agreement, the AZISA was always intended to be a FERC-jurisdictional entity. APS's attempt
4 to rewrite the history of the origins of the AzISA should be disregarded.

5 4. The Rules that were invalidated by the *Phelps Dodge* decision because
6 they were not submitted to the Arizona Attorney General for Certification under the
7 APA are not indispensable to the reinstatement of retail electric competition for the
8 following reasons:

- 9 - First, most, if not all, of the subject matter covered by the Rules
10 that were invalidated are covered by "Arizona law and the General
11 Rules of the Commission" which are applicable to public service
12 corporations in general, and could be applied with the
13 reinstatement of retail electric competition;
- 14 - Second, by including any required conditions or requirements in
15 decisions granting ESP's CC&Ns;
- 16 - Third, by submitting the invalidated Rules to the Arizona Attorney
17 General for Certification. There is no time limit within which the
18 Commission must submit Rules adopted by the Commission for
19 Certification. Furthermore, the APA does not require the
20 Commission to conduct any evidentiary hearing before
21 promulgating rules. Hence, no further evidentiary proceeding
22 would be required for submitting the Rules to the Attorney General
23 in their present form.

24
25
26 ²⁴ APS Settlement Agreement, Paragraph 7.6.

1 **II. Coal-Fired Generation**

2
3 AECC appreciates the serious threat to Arizona, the Navajo Nation and electric
4 consumers when it comes to coal-fired generation. However, arguments that retail
5 electric competition will cause the closure of coal-fired units at the Navajo Generating
6 Station (“NGS”) and Four Corners Power Plant (“FCPP”) are clearly red herrings,
7 targeted at deflecting the primary and real threat to the continued operation of these
8 plants – environmental mandates being implemented by the EPA.

9 A. Navajo Generating Station

10 Just a few weeks ago, SRP announced a plan to close one of three 750-megawatt
11 generators by 2020 in order to satisfy environmental mandates being pushed by the
12 EPA, and delay the installation of costly nitrogen oxide-reducing catalytic converters to
13 cut emissions.²⁵ Several interested “parties” have signed onto this proposal, including
14 entities from California facing state-imposed limitations on coal-fired generation.
15 Nowhere was it indicated that this proposal was a result of the threat of retail electric
16 competition. Furthermore, had this been an Affected Utility rather than SRP, the
17 process for coming to a ‘solution’ would have been fully vetted in a public process.
18 Who is to say this is the right solution for Arizona electric consumers? In fact, Sid
19 Wilson, chairman of the Arizona Coalition for Water, Energy and Jobs and former
20 general manager of the Central Arizona Project, writes:

21 “The latest “proposal” developed with activists during closed-door
22 negotiations calls for the early shutdown of a unit and the use of \$100
23 million in taxpayer funds from the U.S. Department of Interior to help
24 compensate the tribes. Of course that won’t come close to replacing the
25 loss of hundreds of jobs and hundreds of millions of dollars in revenue that
are central to these economies. It does little to address higher water costs,
the increased cost of replacement power or the dramatic economic loss we

26 ²⁵ The Arizona Republic, Friday, July 26, 2013.

1 face. Until we fully understand the ramifications of any proposed plan on
2 our state's water supply strategies, we should not approve or support
3 implementation....The Navajo Generating Station must continue to operate
4 at full capacity over the plant's full term as our early leaders envisioned.
Discussions about the plant must involve all Arizonans for the benefit and
the future of our state."

5 Ironically, it is government overregulation – not competition – that is responsible
6 for the extreme pressure being placed on coal generation at the NGS. In his writing, Mr.
7 Wilson discusses the threat that is jeopardizing Arizona's long-term water supply,
8 stating:

9
10 "Today, our primary water-delivery system is facing a serious threat that
11 jeopardizes Arizona's long-term water supply strategy. The threat comes
12 from the U.S. Environmental Protection Agency's proposed regional haze
13 rule that would require the Navajo Generating Station operators to install as
14 much as \$1.1 billion in emission controls to improve Grand Canyon
visibility. This will drive up energy and water costs and put thousands of
jobs and tens of billions of dollars of economic activity at risk for
potentially no change we will ever see."²⁶

15 Again, it must be pointed out that the events that will result in increased electric
16 rates, and corresponding increase in water rates, will not be the result of the
17 reinstatement of retail electric competition, but rather, requirements imposed by the
18 EPA.

19 B. Four Corners Power Plant

20 The threats facing the FCPP are similar to those facing the NGS. However, there
21 appeared to be a long-term solution to the problem – until APS chose to use its pending
22 acquisition as political leverage in this proceeding. AECC questions why APS'
23 proposal to purchase Southern California Edison's ("SCE") ownership interests in
24 generating Units 4 and 5 at the FCPP and retire older, less efficient generating Units 1, 2
25

26 ²⁶ The Arizona Republic, "My Turn" by Sid Wilson. August 9, 2013.

1 and 3, is not the win/win/win proposition it was in 2010, when the company sought
2 approval from the Commission to move forward. Even in a competitive retail electric
3 market, APS and its customers will have use for lower-cost, baseload generation. In its
4 2010 application, APS stated among other things, that the proposal:

- 5 • saves APS customers money, providing them a nearly \$500 million net
6 present value benefit.
- 7 • has a lower customer bill impact than that of every other likely
8 alternative.
- 9 • significantly reduces Four Corners' regional carbon dioxide ("CO2") and
10 other pollutant emissions by retiring three less efficient coal units and
11 installing environmental upgrades on more efficient units.
- 12 • saves hundreds of jobs and millions of dollars of revenue that are critical
13 to the Navajo Nation and the local economy.
- 14 • preserves the diversity of APS's current generation portfolio while
15 tempering the Company's exposure to volatile natural gas prices.
- 16 • maintains APS' mix of reliable baseload energy. By providing a
17 marginal 179 MW baseload capacity increase, it hedges the Company's
18 energy mix against the possibility that output from other coal units also at
19 risk could be retired and helps further defer the need for future baseload
20 resources. [Emphasis added]

21 In supporting the long-term benefits of the proposal, APS stated that while Units
22 1, 2 and 3 were cost effective now, spending a total of \$586 million in five short years to
23 keep them online changes the math "markedly." As it was then, today's threats to the
24 viability of the FCPP are the impact of costs to implement environmental mandates, and
25 not retail electric competition. In reviewing the benefits of Units 4 and 5, APS provided
26 a detailed analysis in its 2010 application demonstrating why none of the alternative

1 resources (including natural gas) were “realistically available” to fill the void if Units 4
2 and 5 were shut down in 2016 – even with the cost of environmental control technology
3 additions required to meet USEPA mandates. [p. 11-16]. APS argued:

4 “As discussed above, gas-fired generation, the most practical
5 alternative to Four Corners in these circumstances, would further
6 expose APS customers to uncertain gas prices and require that new
7 transmission be built for any new gas-fired power to reach the
8 Company’s primary load center in the Metropolitan Phoenix area.
9 Moreover, as discussed in detail above, the gas generation option
10 will likely be more expensive to APS customers in the end, even
11 after factoring in the acquisition price and cost of SCRs and
12 other environmental upgrades.” [Emphasis added].

13 In addition to being the lowest-cost alternative, other benefits of APS’ proposal
14 include; (i) the continued economic benefit to the surrounding community, especially the
15 Navajo Nation, (ii) a “cleaner” environment resulting from the retirement of inefficient
16 Units 1, 2 and 3, and (iii) a diverse generation portfolio mix for reliability purposes.
17 How is it, then, that retail electric competition suddenly eliminates all these benefits?

18 APS responds by stating that “with uncertain customer relationships, utilities’
19 inability to safely invest much needed capital in coal plant emission technology would
20 threaten the viability of existing coal plants.”²⁷ This response seems to contradict the
21 notion that the pending proposal would secure APS its lowest cost alternative power
22 source at this time, which obviously would impact APS profits. Furthermore, it
23 completely ignores the other benefits of this specific proposal. AECC has been
24 supportive of APS’s efforts to proceed with its plans at FCPP. But if the possibility of
25 direct access causes APS to re-evaluate its options at FCPP, then perhaps that option is
26 not as cost-effective as APS has maintained.

Even if it acquires SCE’s share of FCPP Units 4 and 5, APS will need over

²⁷ APS Initial Comments at 11.

1 545MW of new resources by the 2017 timeframe. Without the proposed transaction,
2 APS' need for new resources could increase to over 1,500 MWs in 2017.²⁸ Whether
3 operating in traditional regulated market or a competitive retail electric market, a
4 demand for lower cost electricity will always ensure that generation from coal-fired
5 facilities will continue – provided the EPA (not retail electric competition) does not
6 overburden plant owners/operators with costly environmental mandates unlikely to make
7 any difference in the quality of air surrounding the Grand Canyon.

8 **III. Divestiture**

9 Much of the critique that opponents level at direct access concerns the presumed
10 divestiture of utility generation assets. For example, APS warns the Commission against
11 relinquishing its jurisdiction over generation and surrendering it to FERC.²⁹ Yet direct
12 access in no way requires such a transfer of jurisdiction. Other states, such as Oregon
13 and Michigan, permit direct access without requiring divestiture and without having
14 transferred state jurisdiction over utility generation assets to FERC. Such a transfer
15 would only occur in Arizona if the Commission voluntarily and expressly ceded
16 jurisdiction as part of an approved divestiture plan. In its Initial Comments, AECC
17 advocated for implementation of direct access without requiring divestiture. And despite
18 the fact that most of the concerns that APS expressed in opposition to direct access relate
19 to divestiture and its implications, APS acknowledges that implementation of direct
20 access will not require divestiture.³⁰ Salt River Project also acknowledges that
21 implementation of direct access would not require divestiture.³¹

22 One of the legal objections raised by opponents is the unconstitutionality of

23
24 ²⁸ Docket No. E-01345A-10-0474; APS Application at p. 12.

25 ²⁹ APS Initial Comments at 7-9.

26 ³⁰ APS Attachment A at 11.

³¹ SRP Initial Comments at 31.

1 mandating utility divestiture of generation assets.³² This objection is rendered moot by
2 adopting AECC's recommendation not to require divestiture as a component of re-
3 implementing direct access service in Arizona.

4 The presumption that direct access requires divestiture extends to opponents'
5 assertions regarding the need for Arizona's participation in an RTO as a precondition of
6 direct access – and the litany of supposed obstacles to RTO formation in this region
7 cited by opponents.³³ To be sure, opponents concede – and AECC agrees – that RTOs
8 facilitate markets³⁴; further, if the Commission *were* to approve a voluntary divestiture
9 of utility generation, an RTO would play an important role in supporting wholesale
10 competition. However, as divestiture is not a requirement of direct access, Arizona's
11 participation in an RTO is also not a necessary condition for direct access in Arizona to
12 proceed. As noted, in AECC's Initial Comments, Arizonans anticipated this concern
13 and formed the AzISA specifically to address issues of ensuring retail access to the
14 transmission system prior to – or in the absence of – an RTO.

15 **IV. Pricing**

16 Opponents of direct access emphasize that average electric prices in restructured
17 states are generally higher than in regulated states. However, this simple comparison
18 does not account for the fact that electricity prices in the United States have always
19 varied significantly by region and that the states with higher regulated prices tended to be
20 the ones that turned to competitive markets for pricing relief. Thus, while the states that
21 restructured still tend to have higher rates on average, competition is helping to close the
22 gap with the historically-lower cost states.

23 ³² APS Initial Response at 15.

24 ³³ APS Initial Comments at 12-14; SRP Initial Comments at 29-30.

25 ³⁴ The Commission concluded that seams issues between California and Arizona pose challenges to major growth in
26 renewable exports, despite FERC Order 1000, which encourages improved regional planning. Decision No. 73625 at
5.

1
2 By citing to national average rate for regulated states, opponents of direct access are
3 trying to take “credit by association” for the lower average rates nationwide among
4 regulated jurisdictions. However, Arizona customers are not actually beneficiaries of that
5 national average. The table on page 5 of APS’s Initial Responses demonstrates that
6 among the 33 states with regulated rates, Arizona has the 6th highest residential rates.
7 Indeed, as a high-cost regulated state, Arizona has more in common with the states that
8 turned to the competitive market for relief than the states that opted to deny customers
9 access to the market.

10 APS’s comments single out the competitive market experience in Texas and
11 Illinois for especially strong criticism, painting a dire picture of each.³⁵ But one need
12 only to examine the table on page 5 of APS’s Initial Responses to see that the retail rates
13 of both Texas and Illinois are lower than those in Arizona. So, if the competitive
14 customers in Texas and Illinois are suffering as much as APS contends – then customers
15 taking regulated service in Arizona must be even worse off. Alternatively, if Arizona
16 customers are faring as well as APS contends, the evidence shows that the competitive
17 customers in Texas and Illinois are doing even better. What is not true, however, is the
18 impression conveyed by opponents that the customers taking competitive service in
19 Texas and Illinois – with their lower rates – are somehow worse off than customers in
20 Arizona.

21 **V. System Reliability**

22 **A. Transmission**

23 Transmission reliability concerns should be completely unaffected by
24 implementation of direct access, as Arizona transmission owners routinely participate in
25

26 ³⁵ APS Initial Comments at 4, APS Attachment A at 17, 24.

1 long-term transmission planning. For instance, the Southwest Area Transmission
2 ("SWAT")³⁶ Planning group, which is a subgroup of WestConnect, routinely assesses
3 and develops cost-effective enhancements for wholesale market needs. In addition, the
4 Western Electricity Coordinating Council ("WECC"), which has a delegation agreement
5 with the North American Electric Reliability Corporation ("NERC"), oversees reliability
6 issues on the western grid, from Canada to Mexico and the fourteen western states in
7 between.

8 The Commission also issues a Biennial Transmission Assessment ("BTA") every
9 two years. In its most recent BTA (seventh), the Commission found that Arizona
10 transmission owners have "implemented steps to address regional transmission planning
11 issues, provide transmission enhancements and additions, develop solutions for
12 transmission import constraints in various load pockets, support the growth of renewable
13 resources in Arizona, and address local transmission system mitigation measures where
14 needed."³⁷

15 Given this conclusion, it should be clear that even in the absence of a Regional
16 Transmission Organization ("RTO"), the AzISA can facilitate the development of a
17 competitive retail electric market without a negative impact to reliability. Affected
18 Utilities have been central participants in the discussions over RTO formation dating
19 back to the 1990s and share responsibility for the lack of progress that has been made in
20 this area. The failure of western utilities to form an RTO (outside the California ISO)
21 should not now be used as a pretext to serve the agenda of those wishing to thwart
22 implementation of direct access in Arizona.

23 B. Generation

24
25 ³⁶ There is also the Central Arizona Transmission System ("CATS") study group, and the Southeast Arizona
Transmission ("SATS") study group.

26 ³⁷ Decision No. 73625 at 2.

1 Affected Utilities and SRP cite the potential lack of incentive to build new
2 generation in a competitive retail market as one threat to reliability.³⁸ However, there
3 does not appear to be an immediate need for the market to incent new builds in order to
4 meet Arizona demand. Earlier this year, Commissioner Pierce submitted a letter in the
5 Integrated Resource Planning docket questioning whether “our utilities have more
6 generation capacity than they reasonably need and/or can put to beneficial use.”³⁹ His
7 question was based on a key finding in the 7th BTA, which stated: “As a result of current
8 economic conditions, the statewide demand forecast for the 2012-2021 ten year planning
9 period has shifted by about six years since the 6th BTA (e.g. it will take about six years
10 longer to reach the previous 2012 demand forecast level).”

11 In response to his inquiries, APS indicated that it had approximately 28% in
12 generation reserves (including call options). TEP and SRP were closer to 12% operating
13 reserves. Clearly, Affected Utilities and SRP would still be able to address demand
14 growth if direct access was implemented, and ESPs chose not to participate. However,
15 one of the key tenants of direct access is to allow a competitive market to put downward
16 pressure on retail rates, and in a region that appears to have excess generations,
17 consumers win.

18 CONCLUSION

19 Henry Ford once said, “Competition is the keen cutting edge of business, always
20 shaving costs.” Jack Welch, former CEO of General Electric, had this to say about
21 competition: “If you don’t have a competitive advantage, don’t compete.” More
22 recently, Arizona Attorney General Tom Horne explained why Arizona filed suit to
23 block the proposed merger between U.S. Airways and American Airlines.

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25 ³⁸ APS Initial Comments at 9; SRP Initial Comments at 34.

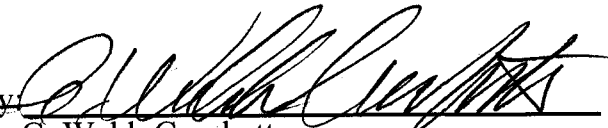
26 ³⁹ January 11, 2013 letter submitted in Docket No. E-00000A-11-0113.

1 "Competition is crucial for a vital economy...As the state's chief legal
2 officer, it is my duty to maintain competitive markets in Arizona for the
3 benefit of our citizens."⁴⁰

4 AECC believes that a competitive retail electric market will provide many benefits
5 besides cost savings to Arizona consumers; innovative products and services designed to
6 fit individual residential and business needs, the continued expansion of renewable and
7 distributed energy options for all classes of customers and the development of other
8 businesses and industries (i.e. electric vehicles, energy efficient products) all competing
9 for customers.

10 RESPECTFULLY SUBMITTED this 16th day of August, 2013.

11 FENNEMORE CRAIG, P.C.

12
13 By 
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17 **ORIGINAL** and 13 copies filed
18 this 16th day of August, 2013 with:

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26 ⁴⁰ Arizona Attorney General Office, Press Release, August 13, 2013.

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